STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Saad, P.J., Doctoroff and Wilder, J.J.

ROBERT MARTIN and CATHY MARTIN,

Plaintiffs-Appellees/
Cross-Appellants,

v

DAVID A. BELDEAN, LISA A. BELDEAN, CAROL ANN ROOTA, JAMES R. STEFFAN, KATHRYN E. STEFFAN, LOIS HALL, a/k/a LOIS A. HALL, DON M. PROCTOR, Trustee, ROBERT P. CRAFT, LINDA M. CRAFT, DAVID A. KAMULSKI, DONALD E. NELSON, SHIRLEY M. NELSON, PETER R. CAVAN, KATHY A. DEGASPERIS, WILLIAM E. STANISCI, TERESA M. STANISCI, MILTON R. BRITTAIN, KATHLEEN M. BRITTAIN, JEFFREY M. WOOLLARD, LYNNE M. WOOLLARD, TERRY M. WEIR, CHRISTINE M. WEIR, RODGER D. HALL, ERSA M. HALL, ROBERT O. PLATZ, SANDRA PLATZ, JOHN E. KARGETTA, JANET B. KARGETTA, EDNA SMITH, BARTON J. HODGE and SUSAN K. HODGE,

Defendants,

and

JOHN R. REDMOND, BARBARA E. REDMOND, EDWARD DAVIES, KAREN A. DAVIES, SAMUEL D. BRANDT and LOIS A. BRANDT,

Defendants-Appellants/
Cross-Appellees.
_____/

Supreme Court No. 120932

Court of Appeals No. 222960

Oakland Circuit Court
No. 98-007800-CH

MICHIGAN DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES' AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED FOR REVIEW

I. **Was the Subdivision Control Act of 1967 the first act that explicitly authorized dedications of land in a plat for less than general public use, or was it 1925 PA 359, as believed by those who were administering the laws and approving "private dedications" from 1925 forward?**

II. **Do lot owners possess rights in the nature of easements to those common areas in the plat that are dedicated for their private use, just as lot owners possess easement rights in common areas that are dedicated to public use, but which dedications have not been accepted by public authorities?**

III. **If a dedication for private use is a legal nullity, should the court consider the intent of the proprietor and the expectations of lot owners and declare the dedication to be one for public use?**

IV. **Where a lot owner seeks to have the dedication portion of a plat modified, must that owner bring an action to modify or alter the plat by the means prescribed by the Land Division Act, rather than by an action in equity which does not include the same safeguards that the LDA contains?**

STATEMENT OF PROCEEDINGS AND FACTS

From 1925 to the present, state officials and agencies have reviewed and approved for recording over 45,000 subdivision plats, many of which dedicate land to less than the general public. Often, the plats reserve for the exclusive use of the lot owners the parks, streets or alleys. It is not uncommon for a plat to contain dedication language by which an outlot is dedicated to the use of the lot owners within the subdivision, as occurred with the plat at issue in this matter. Hundreds of recorded plats that contain private dedications were approved before the Subdivision Control Act of 1967. Administrators of the laws governing plats believe that the authority to approve private dedications has existed since at least 1925, and that in 1967 the law was further clarified to permit the reservation of land in a plat for the common use of the owners of lots.

ARGUMENT

I. The law governing the state's approval of the plat of Tan Lake Shores Subdivision permitted the dedication of land for private use.

A. Standard of Review

Whether a dedication of land for private use failed under the laws governing the creation of plats is a question of law. Questions of law are reviewed *de novo*. *Danse Corp v Madison Heights*, 466 Mich 175, 177-178; 644 NW2d 721 (2002).

B. Since at least 1925, the statutes governing the creation of plats in Michigan have allowed private dedications

The creation and vacation of plats is statutory. *Hooker v Grosse Pointe*, 328 Mich 621, 630; 44 NW2d 134 (1950); *Binkley v Asire*, 335 Mich 89, 96; 55 NW2d 742 (1952). The early statutes contemplated the use of plats for the creation of towns with the common areas set aside for public use. 1 Terr Laws § 16; 1839 PA 91. Words of dedication were not required for the streets, alleys and parks since the purpose of the plat was to lay out a community. The use of platting to create residential subdivisions followed, where it was not critical that common areas be open to the general public. Under 1839 PA 91, 1929 PA 172, and 1967 PA 288, the three post-statehood acts governing plats, the dedication or reservation of land in a plat for the private use of the lot owners became common.

Plats recorded in this state since 1839 PA 91 was amended by 1873 PA 108 took effect have been reviewed and approved for conformity with the law by public authorities. Initially, the county's Register of Deeds performed that function, 1873 PA 108, § 1, but it was transferred to the Auditor General in 1885 by 1885 PA 111, § 1 and continued under 1929 PA 172. The State Treasurer now had that role under 1967 PA 288, § 171; MCL 560.171, and by Executive

Orders, it has been transferred to the Department of Consumer and Industry Services. 1996-2, MCL 445.2001 and 1980-1, MCL 16.732.

Once reviewed and approved for conformity with the act, the plat is eligible for recording with a Register of Deeds and is considered to be "prima facie evidence" of the making and recording of such map or plat in conformity with the governing statute. 1839 PA 91, as amended by 1873 PA 108, § 1 and 1885 PA 111, § 1; 1929 PA 172, § 251; 1967 PA 288, § 251; MCL 560.251.

Various plats approved by the Auditor General under 1839 PA 91 that contain private dedications or reservations have been before this Court. In *Lever v Grant*, 139 Mich 273, 275; 102 NW 848 (1905), an 1885 plat reserved a street as a private way for the lot owners:

> "And we do hereby dedicate to the perpetual use of the public the streets and alleys as shown thereon, reserving to ourselves, our heirs and assigns, the reversion or reversions thereof whenever discontinued by law, excepting the north 30 feet of Custer avenue, which we reserve as a private right of way. Witness, etc."

See also, *Detroit v Myers*, 152 Mich 666; 116 NW 620 (1908) (same plat and private way). In *Schurtz v Wescott*, 286 Mich 691; 282 NW 870 (1938), a 1891 plat dedicated the streets to the public, but not the parks on Diamond Lake. A 1925 plat containing private roads was before the Court in *Minnis v Jyleen*, 333 Mich 447; 53 NW2d 328 (1952). *R.R. Improvement Ass'n v Thomas*, 374 Mich 175, 178; 131 NW2d 920 (1965) involved a 1924 plat with roads dedicated "to the owners of lots in said subdivision." In *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), a 1907 plat dedicated land for the joint use of all owners in the plat. *Hooker v Grosse Pointe, supra*, involved an 1891 plat.

By 1925 PA 360, § 1, 1839 PA 91 was further amended to require words of dedication on a plat, and clearly provided the proprietor the option of creating private roads, parks, and other places:

> [S]aid maps or plats shall also particularly set forth and describe all the public grounds,...*all roads or streets, which are not dedicated to public use, shown in said plat shall be marked "private roads.*"....There shall be printed on said plat a form of dedication, stating the name of plat, that the lands embraced in said plat have been surveyed and platted and that the public streets, alleys and other public places shown on said plat are dedicated to the use of the public, *and if there be any street, park, or other places which are usually public but are not so dedicated on said plat the character and extent of the dedication of such street, park or other public place shall be plainly set forth in said dedication.* [Emphasis added.]

Hooker v Grosse Pointe, supra, 328 Mich at 630, notes that 1929 PA 172 permitted private roads in plats, referencing Section 7 which provided:

> Each plat shall particularly set forth and describe all the public grounds, except streets and alleys, by their boundaries, courses and extent, and all streets and alleys, by their courses, lengths, widths, names or numbers, by writing or figures upon that portion of the plat intended for those uses. *All roads or streets which are not dedicated to public use, shown in the plat shall be marked "private roads".* [Emphasis added.]

Section 12 of 1929 PA 172 also allowed private parks and "other places" to be offered to less than the general public:

> Sec. 12. *[I]f there be any street, park, or other places which are usually public, but are not so dedicated on the plat, the character and extent of the dedication of such street, park or other public place shall be plainly set forth in the dedication.* [Emphasis added.]

Under the 1929 enactment, state officials who administered the law approved numerous plats containing private dedications, including the dedication of Outlot A in Tan Lake Shores Subdivision.

The dichotomy between the common law definition of dedication, and the Legislature's use of that word in 1929 PA 172, was discussed by the Attorney General in OAG 3562, 1961-

1962, p 535 at 537 (September 18, 1962), when addressing a question about the authority of county road commissions to take over platted roads that were dedicated for the use of lot owners only:

> It is also doubtful whether in fact or in law dedication to the use of lot owners only is any dedication whatsoever. A fundamental proposition in the law of dedication is that there can be no dedication to the exclusion of the public as between an owner and individuals. *Kraushaar v. Bunny Run Realty Co.,* 298 Mich. 233. Citing 16 Am Jur. p. 359. A dedication is an appropriation of land to some *public* use made by the owner of the fee and accepted for such use by or in behalf of the public. *Clark v. City of Grand Rapids,* 334 Mich. 646. It must be for a public use and, though it may be dedicated for special uses, the use must be for the benefit of the public in general and not for particular individuals or groups of individuals. *Kraushaar v. Bunny Run Realty Co., supra.* Essentially, the question of dedication is largely one of intention.
>
> Measured against this fundamental law, the dedication in plats "to the use of the lot owners only" is not a dedication as that term is legally understood. On the contrary, rather than indicating a desire to benefit the public, such language is indicative of an intention on the part of the grantor to reserve these streets as private ways. Such a reservation negatives its dedication to the public. *Detroit v Myers,* 152 Mich. 666. and consequently is not encompassed within the provisions or intendment of Section 19.
>
> Further, it is apparent from the provisions of the Plat Act, Act 172, PA 1929, as amended by Act 131, PA 1953, and Act 186, PA 1954, § 12, CLS 1956, § 560.12; MSA 1961 Cum Supp § 26.442. that the legislature has recognized and provided for street dedications other than to the public. Section 12 sets forth in part:
>
> > "* * * If there be any street, park or other places which are usually public, but are not so dedicated on the plat, the character and extent of the dedication of such street, park or other public place shall be plainly set forth in the dedication. * * *"
>
> A dedication of streets which it must be assumed are usually public, to the use of the lot owners only, is a clear declaration of the "character and extent of the dedication" and is "plainly set forth" following the statutory mandate. Such a dedication is, in my opinion, indicative of an intention to reserve such streets making them essentially private in nature. Conversely, such language negatives any intention to make them public.
>
> In light of the legislative recognition and provision for what might be called "private dedication," set forth in Section 12 of the Plat Act, which has remained substantially the same since its effective date October 11, 1929, the

> conclusion is inescapable that by Section 19 of the Highway Classification Act the legislature intended and authorized the taking over of only those streets dedicated to the public. It could do no more without encroaching on vested property rights as discussed above.

The Court of Appeals held that the dedication of Outlot A of Tan Lake Shores Subdivision failed, or was "negated," because the law governing plats did not allow private dedications of land for the exclusive use of the owners of lots. The plat was approved in 1970[1] by the State Treasurer as conforming to 1929 PA 172 (MCL 560.1). Dedications for private uses were clearly allowed by 1929 PA 172, § 12, as amended by 1954 PA 186 (MCL 560.12):

> If there be any street, park or other places which are usually public but are not so dedicated on the plat, the character and extent of the dedication of such street, park or other public place shall be plainly set forth in the dedication.

The Court of Appeals made no attempt to analyze the statutes in effect when the plat was approved. It relied on *Kraushaur v Bunny Run Realty*, 298 Mich 233; 298 NW 514 (1941) which likewise fails to review the statutes governing plats, relying instead only on 16 Am Jur, p. 359, and involves a plat approved in 1924 under 1839 PA 91. The *Kraushaar* Court apparently was not aware of 1915 CL 3350 which the Court in *Leonard-Hillger Land Co v Wayne Co Bd of Auditors*, 203 Mich 466; 169 NW 850 (1918) believed to allow private roads in plats which could have had a bearing on the issue of validity of private parks.

The Court of Appeals also references *Patrick v Young Men's Christian Ass'n*, 120 Mich 185; 79 NW 208 (1899), involving an 1831 plat created under 2 Terr Laws 577.

The fact that the plat of Tan Lake Shores Subdivision dedicates an outlot, rather than a park, is of no significance. 1929 PA 172, § 12, as amended, referred to "other places which are usually public, but not so dedicated on the plat." The dedication of outlots for the exclusive use of lot owners in a plat was common. See *Delaney v Pond*, 350 Mich 685; 86 NW2d 816 (1958);

Summers v Harbor Hills Asso, 351 Mich 195; 88 NW2d 478 (1958); *Musser v Loon Lake Shores Ass'n*, 384 Mich 616; 186 NW2d 563 (1971). The owners of the outlot, whether the subdivision association, the grantor or successor in title, bears the burden of taxation. *Lochmoor Club v Grosse Pointe Woods*, 10 Mich App 394, 397; 159 NW2d 756 (1968). The Court of Appeals erroneously concludes that the conveyance of Outlot A by the original owner contradicts the dedication found on the face of the plat. The conveyance may be evidence of an act of withdrawal of the offer of dedication, in an action brought to vacate the outlot, but it cannot serve as a basis to negate the intent of the proprietor in making the dedication.

The Court of Appeals simply erred in concluding that private dedications are not permitted under the laws governing plats until the Subdivision Control Act of 1967 (now the Land Division Act "LDA", MCL 560.101 *et seq*. The Court's decision is in conflict with *Hooker* as well as the state's interpretation and application of the law governing plats.

II. There is no difference between the rights of lot owners to public dedications versus the rights of lot owners to private dedications.

A. Standard of Review

Whether the rights of lot owners to private dedications differ from the rights of lot owners to public dedications is a question of law. Questions of law are reviewed *de novo*. *Danse Corp v Madison Heights, supra.*

B. The Scope of the Dedication Dictates the Rights of Lot Owners, Not Legal Ownership

Contrary to the Court of Appeals' view of the case, the central issue is not the legal ownership of Outlot A, but the scope of the dedication of that land as intended by the plat

---

[1] 1967 PA 288, § 291 (MCL 560.291) allowed certain plats in process to be completed under 1929 PA 172.

proprietors. *McCardel v Smolen*, 404 Mich 89, 97; 273 NW2d 3 (1978); *Jacobs v Lyon Twp,* 199 Mich App 667; 502 NW2d 382 (1993), *lv den*, 444 Mich 906.

It is obvious from the face of the plat that the proprietors intended that Outlot A provide the lot owners with a means of access to Tan Lake, especially those who did not own littoral lots.

The Court of Appeals rejects the conclusion in *Feldman v Monroe Twp Bd,* 51 Mich App 752, 754-755; 216 NW2d 628 (1974), *lv den* 391 Mich 837 (1974), that equates the rights of lot owners to a private dedication with the rights of lot owners to a statutory, public dedication, and rejects its conclusion that rights vest in lot owners to privately dedicated land. The Court of Appeals offered no logical basis to differentiate the right of a lot owner to use land dedicated for private use versus the right of a lot owner to use land dedicated for public use. Lot owners in either type of plat are entitled to the use of the common areas laid out and intended by the proprietor for their use. *Schurtz v Wescott, supra; Kirchen v Remenga*, 291 Mich 94; 288 NW 344 (1939).

More recently, in *Walker v Bennett*, 111 Mich App 40, 43-44; 315 NW2d 142 (1981), which involved a plat that contained a private drive, the Court of Appeals described the rights of lot owners to the drive:

> We further point out that a purchaser of platted lands, when the plat is recorded, receives not only the interest described in the deed, but also whatever rights are indicated in the plat of the land. *Kirchen v Remenga*, 291 Mich 94; 288 NW 344 (1939), *Fry v Kaiser*, 60 Mich App 574; 232 NW2d 673 (1975).
>
> No public rights are involved in this case as the roads and walkways were never dedicated to the public, but the platting of the land did grant to the owners, including the Walkers and their grantees, a private right which is an easement appurtenant which will not be lost unless abandoned. *Rindone v Corey Community Church*, 335 Mich 311; 55 NW2d 844 (1952), *Kirchen v Remenga, supra.*

In neither *Schurtz* nor *Walker* was any distinction made between private and public dedications and none was warranted.

The Court of Appeals erred in concluding that lot owners have no proprietary right to the land dedicated for their use.

III. Even if the dedication for private use failed, it should have been declared a dedication for public use.

A. Standard of Review

Whether a failed private dedication may be salvaged as a public dedication is an equitable determination. Equitable determinations are reviewed *de novo*. *Abner A. Wolf, Inc v Walch*, 385 Mich 253, 266; 188 NW2d 544 (1971).

B. The Court of Appeals Failed to Consider Whether the Dedication Could be Salvaged

Where dedications for private use have failed in the past, the courts have attempted to ascertain the intent of the proprietor, and salvage the dedication. In *Hooker, supra*, the Court stated at 630:

> In *Dickerson v. City of Detroit*, 99 Mich 498, we said there are authorities which hold that a dedication for a street with a right reserved in the owner, is a good dedication, but the condition or reservation, if inconsistent with the use for which the dedication is made, is void. In the case at bar the private way in a public street is inconsistent with the uses and purposes of a public street and therefore void. We hold that the west one half of Lakeland avenue as shown on the 1891 plat was dedicated to the public free and clear of any private ways.

Likewise, in *Kraushaar, supra*, which the Court of Appeals heavily relied upon in reaching its conclusions about the validity of private dedications, the Court held at 242:

> We are of the opinion that the only fair and reasonable construction that can be placed upon the dedication of the drives, roads, and boulevards, laid out in the plat of the Porritt farm, if in fact and in law there was any dedication at all, is that there was a dedication to the general public of the same. It follows that the theory of these plaintiffs on which they seek injunctive relief is not tenable.

See also, *Grosse Pointe Shores v Ayers*, 254 Mich 58, 65; 235 NW 829 (1931).

The Court of Appeals relied on *Patrick v Young Men's Christian Ass'n, supra*, involving an 1831 dedication of a church square in a plat. After concluding that the statutory dedication

failed for the reason that the statute was not designed to apply to any dedication other than those for general public purposes, the Court concluded that a valid common law dedication had occurred:

> The plat only serves to show what the owner intended, and to make certain the terms under which the St. Luke's Society erected its buildings and maintained possession, from which the offer ripened into a dedication. It is evidence as an act *in pais* of dedication at common law. *Lessee of Village of Fulton v. Mehrenfeld*, 8 Ohio St. 440. [120 Mich at 197.]

The Court quoted from *Benn v Hatcher*, 81 Va. 25, which involved the dedication of land for a cemetery:

> "In its technical legal sense, dedication is the appropriation of land for a public use, - as for a highway, a common, or the like, - but may be effectual, it seems, when made to a pious or charitable use, though not distinctively a public one." [120 Mich at 191.]

Also see, *Crosby v City of Greenville*, 183 Mich 452; 150 Mich 246 (1914) where a technically deficient plat could still result in a common law dedication of a land for public use.

The Court of Appeals simply disregarded the intent of the proprietors and the expectations of owners of lots in Tan Lake Shores Subdivision who bought their property in reliance on the plat. If the dedication failed because the offer was made to less than the general public, the Court should have determined whether the dedication of Outlot A should be considered as one for public use as the Supreme Court did in both *Hooker* and *Kraushaar*, or a valid common law dedication as in *Patrick.*

IV. Plaintiffs should not be allowed to circumvent the plat vacation process required by law.

A. Standard of Review

Whether plaintiffs circumvented the process established by law for the vacation of a portion of the plat is a question of law. Questions of law are reviewed *de novo*. *Danse Corp v Madison Heights, supra.*

B. **Neither the Trial Court and Court of Appeals had Jurisdiction to Entertain Plaintiffs' Quiet Title Action**

A dedication is an essential component of a plat. It was required by 1929 PA 172, Section 12 and is required today by Section 144 of the LDA (MCL 560.144) (although renamed as a "proprietor's certificate").

Dedication language governs the rights of lot owners and the public to land within the plat. Plats are "statutory" and their creation is governed by law. *Hooker, supra*, 328 Mich at 630. Likewise, the vacation, modification or alteration of a plat is an action at law, and not one in equity. *Binkley v Asire, supra*, 335 Mich at 96-97; *Darnton v Hayes Twp,* 22 Mich App 575, 578-581; 177 NW2d 706 (1970); *Hall v Hanson*, 255 Mich App 271; ___ NW2d ___ (2003). Section 104 of the LDA states:

> A replat of all or any part of a recorded subdivision plat may not be approved or recorded unless proper court action has been taken to vacate the original plat or the specific part thereof....

Section 222 provides:

> To vacate, correct, or revise a recorded plat or any part of it, a complaint shall be filed in the circuit court by the owner of a lot in the subdivision, a person of record claiming under the owner or the governing body of the municipality in which the subdivision covered by the plat is located.

By their lawsuit, plaintiffs were clearly attempting to negate the dedication language found on the face of the plat. The trial court should have dismissed plaintiffs' action for lack of jurisdiction due to the failure to bring it under the vacation process set forth in MCL 560.221-.229. *Hall v Hanson, supra*, 255 Mich App at 286. Where an adequate remedy at law exists, resort to equity is inappropriate. *United States Fidelity & Guarantee Co v Kennsha Investment Co*, 369 Mich 481, 486; 120 NW2d 190 (1963); *Hall v Hanson, supra*, 255 Mich at 286.

Had this matter been brought under the LDA, the question for the trial court would have been whether the defendant lot owners have any "reasonable objection" to the proposed vacation

of the dedication language. See *Westveer v Ainsworth*, 279 Mich 580, 585; 273 NW 275 (1937); *In re Gondek*, 69 Mich App 73, 76-77; 244 NW2d 361 (1976). Proper parties would have been joined. MCL 560.224a. If the dedication was vacated by the court, an amended plat would result with the dedication language removed. MCL 560.229.

Further, aside from the procedural deficiencies, the Court of Appeals allowed restrictive deed covenants to, in essence, supersede the dedication language found in the plat:

> The restrictions document expressly refers to the plat documents at Liber 129, pages 29 and 30, the documents were executed and recorded at the same time and they relate to the same transaction. Further, copies of deeds for lots sold in the subdivision that were submitted by the parties not only refer to the plat, but specifically state that the deed is subject to recorded restrictions. Accordingly, we construe the documents together as one instrument for purposes of determining the rights of the lot owners. *West Madison Inv Co v Fileccia*, 58 Mich App 100, 106; 226 NW2d 857 (1975). Reading the documents together, we find that P17 clearly and unambiguously provides for a twenty-five year duration for "all the restrictions, conditions, covenants, charges, easements, agreements and rights herein contained." Thus, as matter of law, the "reserved for the use of the lot owners" restriction expired in November 1994 and defendants, as lot owners, may not enforce it. See *Sampson v Kaufman*, 345 Mich 48, 52-53; 75 NW2d 64 (1956).

There is absolutely no provision in the LDA, MCL 560.101 *et seq*, or its predecessors, to allow a plat to be changed in the way the Court of Appeals allowed here. The covenants were allowed by the Court of Appeals to negate rights expressed on the face of the plat. The restrictions were instruments created independently of the platting process provided by law, and are not reviewed and approved for conformity with the governing law by public authorities. They cannot be allowed to circumvent the judicial process provided in the LDA for the vacation, alteration or modification of a plat which served to protect valuable property rights.

Both the Court of Appeals and trial court lacked jurisdiction to negate the dedication language on the plat due to the plaintiffs' failure to follow the method prescribed by law.

RELIEF SOUGHT

This Court should reverse the determination that the private dedication was a nullity and order the action dismissed for lack of jurisdiction due to the failure of the plaintiffs to follow the process prescribed by law for the vacation, modification, or alteration of a plat.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

A. Michael Leffler (P24254)
Assistant in Charge

James E. Riley (P23992)
Assistant Attorney General
Attorneys for Michigan Department of
Consumer and Industry Services
Department of Attorney General
Environment, Natural Resources and
Agriculture Division
Constitution Hall, 5th Floor South
525 West Allegan
Lansing, MI 48913
(517) 373-7540

Dated: May 20, 2003
s:open plats martin supreme court amicus brief